CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 432

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

vs.

DAN E. MAHER, DOING BUSINESS AS INTERSTATE BUSSES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

FILED OCTOBER 20, 1928

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[Citation in usual form showing service on Wm. L. Harrison, filed Sept. 7, 1938, omitted in printing.]

In United States District Court for the District of Oregon

No. E-9722

DAN E. MAHER, DBA INTERSTATE BUSSES, PLAINTIFF

vs.

HE UNITED STATES OF AMERICA, AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Bill of complaint for injunction

Filed Dec. 15, 1937

Your petitioner files his petition against the Uinted States of merica, and the Interstate Commerce Commission to annul, set aside d enjoin an order, hereinafter set forth, of the Interstate Commerce ommission, hereinafter called the "Commerce Commission," a comission existing under and by virtue of the Interstate Commerce Act, d thereupon your petitioner complains:

I

Jurisdiction of this Court is invoked under the provisions of Title , U. S. C. A. Section 41 (28) and Sections 43-48 inclusive, of said ct.

II

Your petitioner is a common carrier by motor vehicle, engaged in terstate operations over U. S. Highway #99, between Portland, regon and Seattle, Washington, and through various intermediate oints, transporting passengers for the general public for compensaon from each of the aforesaid cities to the other, and from various oints within each of the states of Washington and Oregon, to points ithin other of said states, and in this respect petitioner alleges that was in bona fide operation as a common carrier by motor vehicle tween said cities on June 1, 1935, and that by reason of such operaon this petitioner is, and was at all times herein mentioned entitled a matter of right and law, under the provision of Section 206a of e Motor Carrier Act of 1935, known as the "Grandfather" clause ereof, to have issued to him by the defendant Commerce Commison, a certificate of public convenience and necessity, authorizing ch operation, and that pending the issuance of said certificate, petiner is of right, and as provided in said certificate, entitled to ntinue his service.

5

III

Petitioner, by application filed on or about the 1st day of January 1936, with said defendant Commerce Commission, sought a certificate of public convenience and necessity, authorizing petitioner to operate as a common carrier by motor vehicle of passengers and their baggage over U. S. Highway #99, between Portland, Oregon, and Seattle, Washington, and intermediate points thereof.

IV

That thereafter the defendant Commerce Commission assigned said petition for hearing before Joint Board #45, and a hearing was had before said Joint Board #45 on the 12th day of November 1936; that thereafter, and on the 10th day of March 1937, the said Joint Board #45 returned to the defendant Commerce commission, its Report and Recommended Order to which, within 25 days from the date of service thereof, the said petitioner served and filed his exceptions to said Report and Recommended Order; that thereafter, and on the 27th day of October 1937, the defendant Commerce Commission ordered that the application of said petitioner for a certificate of public convenience and necessity be denied and made said order effective December 10, 1937, and further ordered that said petitioner cease and desist on or before the 10th day of December 1937 from operations as a common carrier by motor vehicle of passengers and their baggage in interstate commerce from Portland, Oregon, to Seattle, Washington; that thereafter, and on the 27th day of November 1937, said petitioner filed with the defendant Commerce Commission his petition for a rehearing and reconsideration; that on the 6th day of December 1937, the defendant Commerce Commission made and entered its order denying rehearing and reconsideration of the matters therein contained, but did make and enter an order extending the time for the petitioner to cease and desist operations as a common carrier, from the 10th day of December 1937 to the 10th day of January 1938.

V

Petitioner alleges that by his application filed with the defendant Commerce Commission, and by evidence deduced at the purported hearing before Joint Board #45, it was shown that petitioner was in bona fide operation as a common carrier by motor vehicles on June 1, 1935, over the routes and within the territory for which application was made, and prior thereto; that there was no evidence before said defendant Commerce Commission to the contrary; that said purported order of the defendant Commerce Commission, requiring petitioner to cease and desist operation on or before the 10th day

6 of January 1938, and is without evidence to support it, and is contrary to the evidence, and in making and entering said pur-

ported order, the Commerce Commission exceeded its statutory powers and acted arbitrarily and unreasonably, and based said purported order on improper distinctions and considerations and interpretations of the Motor Carrier Act of 1935; that by reason of the premises petitioner has been denied due process of law, contrary to the provisions of the Fifth Amendment to the Constitution of the United States, and will suffer great and irreparable injury in that petitioner's business will be wholly lost and destroyed, and petitioner's revenue from passengers who would otherwise travel by petitioner's service will be irreparably lost and petitioner's investment in coaches, busses, offices, and other facilities made wholly unproductive; that petitioner's employees will be deprived of this means of livelihood and the traveling public will be prevented from traveling by petitioner's service, as they would otherwise choose to do. That defendant Commerce Commission by law is not responsible in damages for such loss or injury to petitioner, to petitioner's employees, nor to the public, and such losses are not compensible in damages; that even a temporary cessation of petitioner's service would cause irreparable loss and injury and would be equivalent to a final adjudication in defendant's favor despite the numerous issues of law and facts which can only be determined by a full hearing on the merits.

Wherefore, petitioner prays:

1. Writ of Subpoena ad Respondendum issue immediately out of, and under seal of this Court, and be directed to said defendants, United States of America and Interstate Commerce Commission, requiring and commanding said defendants on day certain therein to be specified to be and appear before this Court and to answer this Bill;

2. That this Court direct that due and proper notice of this Bill and proceedings issue, and be served forthwith, as prescribed in Act of October 22, 1913, C-32; 28 U. S. C. A., Sec. 41 (28) and 43 to 48 inclusive;

3. That a Court, constituted as required by said Act of October 22, 1913, C-32; 28 U. S. C. A., Sec. 47, be convened and that said Court, as constituted and convened, after hearing had upon due and legal notice to defendants, enter its order setting aside and annulling said order of said Interstate Commerce Commission, and each and every part thereof, and forever enjoining any construction thereunder;

4. That petitioner have and recover of said defendants his proper costs of suit;

5. That petitioner have such other, further, and general relief as may be equitable and proper.

Respectfully submitted.

WM. L. HARRISON and EDW. DOXEY;
Attorneys for Petitioner.

[*Duly sworn to by Dan E. Maher; jurat omitted in printing.*]
[File endorsement omitted.]

9 In United States District Court

[Title omitted.]

Answer of Interstate Commerce Commission

Filed Jan. 8, 1938

The Interstate Commerce Commission, one of the defendants in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiff's bill of complaint contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraphs I, III, and IV of the bill of complaint, the Commission admits that the allegations therein contained are
10 true, except that the Commission denies that the statements of said paragraph IV as to the substance and effect of the Commission's report and orders are full, true or correct statements of the contents thereof and respectfully refers the court to said report and orders for information concerning the same.

II

Answering paragraph II of the bill of complaint, the Commission says that it has no knowledge as to whether or not the plaintiff is now a common carrier by motor vehicle as alleged in said paragraph. Further answering said paragraph of the bill of complaint the Commission denies that the plaintiff was engaged in the bona fide operation as a common carrier by motor vehicle between Portland, Oreg., and Seattle, Wash., on June 1, 1935, as alleged in said paragraph; denies that plaintiff has been engaged in such operation since June 1, 1935, within the meaning of Section 206 (a) of the Motor Carrier Act of 1935; denies that plaintiff either is now, or has been in the past, entitled under said section or any other section of said Act to have issued to him by the Commission a certificate of public convenience and necessity either authorizing or entitling the plaintiff to continue the operation described in the application referred to in said paragraph II of the bill of complaint, and further denies that plaintiff is entitled to operate or to continue to operate said service pending the issuance of such certificate.

III

Further answering said bill of complaint, the Commission admits and alleges that it made the order of October 27, 1937,
11 referred to in paragraph IV of the bill of complaint in a proceeding then pending before it wherein was involved the right

of the plaintiff to receive from the Commission a certificate of public convenience and necessity authorizing plaintiff to operate as a common carrier by motor vehicle in interstate commerce as described in paragraphs III and IV of the bill of complaint; that the Commission made a report in said proceeding which was also dated October 27, 1937, and which was referred to and made a part of said order of October 27, 1937; that said order of October 27, 1937, was by its terms made effective December 10, 1937, and that by order dated December 10, 1937, the effective date of said order was changed from December 10, 1937, to January 10, 1938. The Commission refers the court to said report and orders, copies of which are attached to this answer as Exhibit A, for more full and complete information in the premises.

The Commission further alleges that in said proceeding the parties therein, including the plaintiff herein, were, and that each of them was, afforded the full hearing provided for in and by the Interstate Commerce Act; that in said hearing a large volume of testimony and other evidence bearing upon the matters covered in and by said report and orders was submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of said plaintiff by the counsel of said parties; that at said hearing and subsequently the questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including all questions presented by the plaintiff in this suit, whereupon the Commission determined said matters and entered and duly served upon said plaintiff
12 and upon all other interested parties, its said report and order of October 27, 1937; that said report and order of October 27, 1937, included the Commission's findings of fact, decisions, conclusions, orders and requirements in the premises, and that, upon the evidence aforesaid, as shown in and by said report, the Commission made the findings and stated the conclusions upon which said report and order of October 27, 1937, are based.

The Commission further alleges that the findings and conclusions in said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceeding as aforesaid.

The Commission further alleges that in making said report and orders it considered and weighed carefully in the light of its own knowledge and experience each fact, circumstance and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, including the matters covered by the allegations of the bill of complaint herein.

The Commission further alleges that said order of October 27, 1937, was not made or entered either arbitrarily or unjustly or contrary to the relevant evidence, or without evidence to support it; that in making said order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each

of and all the allegations to the contrary contained in said bill of complaint.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the bill of
13 complaint in so far as they conflict either with the allegations herein or with either the allegations or conclusions of fact contained in said report and order of October 27, 1937, which report and order, as aforesaid, are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain and prove, as this Honorable Court shall direct, and hereby prays that said bill of complaint be dismissed.

INTERSTATE COMMERCE COMMISSION,
By NELSON THOMAS, *Attorney.*

DANIEL W. KNOWLTON,
Chief Counsel,
Of Counsel,

14 [*Duly sworn to by Joseph B. Eastman; jurat omitted in printing.*]

15 *Exhibit A to answer*

Interstate Commerce Commission

No. MC 59620

DAN E. MAHER, COMMON CARRIER APPLICATION

Submitted July 20, 1937. Decided October 27, 1937

Applicant found to have failed to establish the right to a certificate as a common carrier by motor vehicle of passengers and their baggage between Portland, Oreg., and Seattle, Wash., under the "grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935. Certificate denied and operations ordered discontinued.

William L. Harrison for applicant.

Alvin A. Kurtz for Public Utilities Commissioner of Oregon, and Philip Chipman, L. W. Hobbs, Paul P. Farrens, Raymond W. Clifford, and Herbert J. Shaw for protestants.

REPORT OF THE COMMISSION

Division 5, Commissioners EASTMAN, LEE, and ROGERS

By Division 5:

No exceptions were filed to the recommended order of the joint board but it was stayed by our order of April 24, 1937, and the parties were permitted to file supplemental briefs thereafter.

By application filed January 24, 1936, under the "grandfather" clause of section 206 (a) of the Motor Carrier Act, 1935, Dan E.

Maher of Portland, Oreg., seeks a certificate of public convenience and necessity authorizing operation as a common carrier by motor vehicle of passengers and their baggage between Portland and Seattle, Wash., over U. S. Highway 99. The Public Utilities Commissioner of Oregon, Oregon Bus Association, Motor Coach Association of Washington, North Coast Transportation Company, and certain rail lines appeared in opposition to the application.

In writing prior to the hearing and orally at the hearing applicant moved to strike the protests of the Public Utilities Commissioner of Oregon, Oregon Bus Association, and North Coast Transportation Company. The joint board overruled the motion. On brief applicant renews the motion and asks that we rule thereon. It is contended that these protestants are not real parties in interest and that the protests of the Oregon Bus Association and North Coast Transportation Company are prejudicial in that they were filed by or on behalf of applicant's competitors. In proceedings such as this, any person who has an interest therein may appear and be heard. These protestants filed written protests prior to the hearing, in accordance with our rules, which protests clearly show that protestants
16 have an interest in the proceeding. Obviously, the regulatory body of a State in which an applicant claims to have conducted bona fide motor vehicle operations and other carriers who operate in the same territory have a direct interest in the proceeding. The motion was properly overruled.

At present applicant is engaged in the transportation of passengers between Portland and Seattle over U. S. Highway 99, serving intermediate points. Operations are conducted on a regular daily schedule between fixed termini. Fares are based on a published tariff. A 25-passenger bus, purchased particularly for this service, is regularly used, and applicant also owns a 10-passenger vehicle which is used when needed. Operations as at present carried on were commenced on May 29, 1936, under the trade name Interstate Busses, a trade name not theretofore used. It is contended by applicant that he is entitled to a certificate under the "grandfather" clause of section 206 (a) of the act authorizing him to continue this service by virtue of bona fide operations conducted on, prior to, and after June 1, 1935.

Applicant has been engaged in the transportation of passengers since 1931. Prior to the institution of his present regular operation between Portland and Seattle on May 29, 1936, he conducted an irregular, so-called anywhere-for-hire operation in Oregon with occasional trips to points in Washington. This operation consisted mostly of the transportation of groups of employees from Portland to logging camps in Oregon and Washington. Baseball and basketball teams were also transported. Applicant maintained no terminal facilities. He obtained his business principally through contacts with employment agencies at Portland where men were hired for work at logging camps. While the application alleges that trips were made over the considered route on an average of three times per week,

applicant testified that this was only an estimate and that "Sometimes I went into the State of Washington twice a day with two cars; and sometimes I didn't go into the State of Washington for a month." Operation was conducted in Oregon under an anywhere-for-hire permit issued by the Public Utilities Commission of Oregon. Two vehicles of 10 or 11-passenger capacity were used. Applicant did not publish a tariff but based his charges on the mileage involved on each trip.

Applicant kept detailed records with respect to his operations in Oregon for the purpose of making reports to the authorities of that State. No record, however, was kept of operations in Washington for the reason that no reports were made to the authorities of that State. In instances where trips were made to Washington applicant's records would show the destination point as Vancouver, Wash., or Vancouver Bridge, the point at which the State of Washington was entered. The oral testimony of applicant's witnesses is that trips were made at various times between 1933 and 1936 to Deep River, Cathlamet, Raymond, Aberdeen, Fall City, La Salle River, Chehalis, Olympia, Seattle, Centralia, Neah Bay, Greenwood, Port Ludlow, and Spokane, Wash. It appears that 11 such trips were made in 1935 and six during 1936 between January and April. The evidence does not disclose, however, what particular distinations were served on the 16 trips just mentioned, but only that trips to points in Washington were made.

17 Although the application alleges that regular-route operations were conducted on U. S. Highway 99 between Portland and Seattle and that all intermediate points were served on June 1, 1935, it is to be noted that many of the points specifically referred to in the evidence are located on other highways. For example, Cathlamet and Deep River are on U. S. Highway 830; Raymond and Aberdeen are on U. S. Highway 101; Neah Bay is in the extreme northwestern corner of the State a considerable distance from any point on U. S. Highway 99 between Portland and Seattle; and Spokane is in the extreme eastern part of the State many miles from U. S. Highway 99. Prior to the institution of his scheduled service between Portland and Seattle, applicant had not made a trip to Seattle since about 1933. There is no evidence of service at any time to most of the intermediate points on the considered route, nor is it shown that passengers were transported on return trips to Portland.

When applicant instituted regular-route service between Portland and Seattle it appears that he discontinued the so-called anywhere-for-hire operations theretofore conducted. It is his desire that we issue him a certificate authorizing continuance of his present regular service between fixed termini. Carriers are entitled, under the "grandfather" clause, to authority to continue the bona fide "operations" in which they were engaged on June 1, 1935, and continuously thereafter. Such certificates may not authorize continuance of operations instituted after that date. The rights of a carrier under this clause must be measured by his actual bona fide operations.

The evidence is convincing that on May 29, 1936, applicant instituted a new and different service from that previously conducted. The operations conducted on June 1, 1935, and prior thereto were in the nature of irregular operations in the transportation of groups of persons from Portland to any point in Oregon or Washington over any route adapted to a particular trip. While U. S. Highway 99 probably was used for at least part of the distance on most if not all of applicant's trips to Washington, the evidence wholly fails to sustain applicant's claim that a regular common-carrier service over that route between Portland and Seattle, with service at all intermediate points, was conducted. It follows that applicant's present operations were instituted and have since been conducted in contravention of the provisions of the act.

We find that applicant has failed to establish that he was in bona fide operation as a common carrier by motor vehicles of passengers and their baggage between Portland, Oreg., and Seattle, Wash., over a regular route, on June 1, 1935, and that he has so operated since that time. An order will be entered denying the application and requiring applicant to cease and desist from any operation in the transportation of passengers and their baggage in interstate or foreign commerce.

LEE, Commissioner, concurring in part:

This applicant has been engaged in the interstate transportation of passengers, as a carrier by motor vehicle, since 1931. Under the "grandfather" clause of the Motor Carrier Act, 1935, he is entitled to continue to operate. I agree with the majority that his regular route operation between Portland and Seattle does not come within the purview of the "grandfather" clause. However, he did continue motor carrier operations begun long before the passage of the act, and it is not right that he should be deprived of his right to operate in interstate commerce as he was doing when the act was passed. By the "grandfather" clause, it was sought to protect carriers in their existing operations. I would issue to him a certificate of convenience and necessity authorizing continuance of the operation he was conducting when the act was passed.

18

19

ORDER

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 27th day of October, A. D. 1937.

No. MC 59620

DAN E. MAHER COMMON CARRIER APPLICATION

Investigation of the matters and things involved in this proceeding having been made, and said division on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is made a part hereof:

It is ordered that said application be, and it is hereby, denied, effective December 10, 1937.

And it is further ordered that applicant be, and he is hereby, notified and required to cease and desist, on or before December 10, 1937, from all operation in interstate or foreign commerce as a common carrier of passengers and their baggage by motor vehicle.

By the Commission, division 5.

[SEAL] W. P. BARTEL, *Secretary.*

20 [Copy]

ORDER

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 10th day of December, A. D. 1937.

No. MC 59620

DAN E. MAHER COMMON CARRIER APPLICATION

Upon further consideration of the record and of applicant's request for postponement of the effective date of the Division's order of October 27, 1937, in the above-entitled matter, and good cause therefor appearing;

It is ordered that the effective date of the said order of October 27, 1937, be, and it is hereby, postponed to January 10, 1938.

By the Commission, division 5.

[SEAL] W. P. BARTEL, *Secretary.*

[File endorsement omitted.]

22 In United States District Court

[Title omitted.]

Answer of United States of America

Filed Jan. 18, 1938

United States, one of the defendants in the above entitled cause, for answer to the bill of complaint filed herein against it, answers and says:

I

United States admits the truth of the facts alleged in paragraphs I, III, and IV of the bill of complaint, except that it denies that the allegations of said paragraph IV contained full, correct, and complete statements concerning the report and orders of the Interstate Commerce Commission which are therein mentioned, and for full and complete information concerning them the court is respectfully referred to the full text of said report and orders, copies of which are attached hereto and made a part of this answer as Exhibit A.

II

Answering paragraph II of the bill of complaint, United States says that it has no knowledge as to whether the plaintiff is now a common carrier by motor vehicle as alleged in said paragraph and as to that allegation it neither admits nor denies; but United States denies each and every other allegation made and contained in said paragraph II of the bill of complaint.

III

Answering paragraph V of the bill of complaint, United States denies each and every allegation therein and particularly denies that plaintiff will suffer irreparable or any other legal injury if the Commission's said order is not enjoined and annulled; and, further, denies that said order is unlawful or void for any of the reasons alleged in said paragraph V or anywhere in the bill of complaint.

23 Wherefore, having fully answered, United States prays that the relief sought by the bill of complaint be dismissed at the cost of the petitioners, and that it have the benefit of such other and further orders, decrees, or relief as may be just and proper.

ELMER B. COLLINS,
Special Assistant to the Attorney General.

ROBERT H. JACKSON,
Assistant Attorney General.

CARL C. DONAUGH,
United States Attorney, District of Oregon.

ALLAN HART,
Assistant United States Attorney.

[Duly sworn to by Elmer B. Collins; jurat omitted in printing.]

Exhibit A, the same being No. MC 59620, is omitted.

The foregoing answer of U. S. of America served and accepted this 18th day of January 1938.

WILLIAM L. HARRISON, *Atty. for pet.*

[File endorsement omitted.]

25 In United States District Court

[Title omitted.]

Order

February 11, 1938

Now at this day comes Mr. Carl C. Donaugh, United States Attorney and presents to the court Mr. Elmer B. Collins, Special Assistant to the Attorney General to appear in this case as counsel for the defendant The United States, and also presents Mr. Nelson Thomas,

attorney for the Interstate Commerce Commission who is to appear in this case on behalf of the Interstate Commerce Commission. Whereupon, now comes the plaintiff by Mr. William L. Harrison and Mr. Edw. O. Doxey, of counsel, and the defendant The United States of America by Mr. Elmer B. Collins, Special Assistant to the Attorney General, and the defendant The Interstate Commerce Commission, by Mr. Nelson Thomas, of counsel. Whereupon this cause comes on for final hearing before the Honorable Bert E. Haney, United States Circuit Judge for the Ninth Circuit, and the Honorable James Alger Fee and the Honorable Claude McColloch, United States District Judges for the District of Oregon, upon the pleadings and the proofs, and the court having heard the arguments of counsel, will advise thereof. Whereupon, upon motion of the respective parties hereto,

It is ordered that the plaintiff be and is hereby allowed ten days from this date in which to submit his brief herein, and that the defendants be and are hereby allowed ten days thereafter in which to file their answering brief herein.

27 In United States District Court for the District of Oregon

DAN E. MAHER, DOING BUSINESS AS INTERSTATE BUSSES, *Plaintiff*

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

Opinion

Filed June 16, 1938

JAMES ALGER FEE, District Judge:

This is a suit brought under Title 28, U. S. C. A. Sec. 41 (28) and Sections 43–48 to set aside an order of the Interstate Commerce Commission made October 27, 1937, in a proceeding designated "MC 59620, Dan E. Maher Common Carrier Application." Maher as a common carrier of passengers and their baggage in interstate commerce over the route of U. S. Highway 99 and within territory contiguous thereto upon June 1, 1935, filed his application on or about January 1, 1936, for a certificate confirming his right under the proviso of Section 206a of the Motor Carriers Act of 1935, 49 U. S. C. A. 306a.[1] The form of the application is not before the Court but it is set up in the complaint and admitted that "petitioner, by application filed on or about the 1st day of January 1936 with said defendant Commerce Commission, sought a certificate of public convenience and necessity, authorizing petitioner to operate as a common carrier by motor vehicle of passengers and their baggage over U. S. Highway #99, between Portland, Oregon, and Seattle, Washington, and intermediate points

[1] All subsequent section references are to the law as codified in United States Code Annotated.

thereof." It is also alleged and admitted that plaintiff "is a
28 common carrier by motor vehicle, engaged in interstate operations over U. S. Highway #99, between Portland, Oregon, and Seattle, Washington, and through various intermediate points, transporting passengers for the general public for compensation from each of the aforesaid cities to the other, and from various points within each of the states of Washington and Oregon, to points within other of said states, and in this respect petitioner alleges that he was in bona fide operation as a common carrier by motor vehicle between said cities on June 1, 1935, and that by reason of such operation this petitioner is, and was at all times herein mentioned entitled as a matter of right and law, under the provisions of Section 206a of the Motor Carrier Act of 1935, known as the 'Grandfather' clause thereof, to have issued to him by the defendant Commerce Commission, a certificate of public convenience and necessity, authorizing such operation." The facts contained in this allegation are admitted by answer.

Upon the filing of said application the matter was referred for hearing to Joint Board No. 45 by the Commission. The Public Utilities Commissioner of Oregon, certain railroads and bus companies were permitted to intervene and oppose the granting of the application. The Commission found that Maher had been, since 1931, conducting a quite irregular transportation of passengers in interstate commerce between Oregon and Washington, continuously to the date of the filing of his application and thereafter until May 29, 1936. The Commission noted that the transportation was authorized under an "anywhere-for-hire" license issued by the Public Service Commission of Oregon and apparently recognized by the authorities of Washington. The bona fides of the operation is established by the facts found. But the Commission held that long after Maher had filed his
29 application for a certificate before it he had begun operation on a regular schedule of a passenger service over the same route and within the same territory and thereafter no longer proceeded with transportation on an irregular schedule as he had done before. It was further found that all Maher's operations in interstate commerce were "probably" over a "route" U. S. Highway 99, whether on the one hand the transportation was "anywhere-for-hire" from Portland, Oregon, to Deep River, Cathlamet, Raymond, Aberdeen, Fall City, La Salle River, Chehalis, Olympia, Seattle, Centralia, Neah Bay, Greenwood, Port Ludlow, and Spokane, all of which points are in the State of Washington and can best be reached from Portland over U. S. Highway 99 or, on the other hand, on regular schedule between Portland, Oregon, and Seattle, Washington, as fixed termini, since both these points are on U. S. Highway 99. The Commission findings also show that all Maher's operations in interstate commerce were "within a territory," viz, the territory between Portland, Oregon, and Seattle, Washington, and contiguous to U. S. Highway 99.

The Commission concluded that by instituting a regular route with fixed termini the applicant had abandoned his irregular operations.

Based upon this conclusion an order was issued in the following terms:

"Investigation of the matters and things involved in this proceeding having been made, and said division on the date hereof having made and filed a report containing its findings of fact and conclusions thereon, which report is made a part hereof:

"It is ordered, That said application be, and it is hereby, denied, effective December 10, 1937.

"And it is further ordered, That applicant be, and he is hereby, notified and required to cease and desist, on or before December 10, 1937, from all operation in interstate or foreign commerce as a common carrier of passengers and their baggage by motor vehicle."

This court has jurisdiction to enjoin, set aside, annul, or suspend
suit. The cause was tried before a statutory court. No evidence
30 was introduced except a copy of the findings of the Commission which are accepted as the facts.

This court has jurisdiction to enjoin, set aside, annul, or suspend in all or in part any order of the Interstate Commerce Commission, Title 28, U. S. C. A., Section 41, Subdivision 28, but the findings of the Commission are conclusive and can not be assailed "in the absence of the evidence upon which they were made." Mississippi Valley Barge Line Co. vs. United States, 292 U. S. 282. No court, of course, should review a determination which was exclusively within the scope of the power and the discretion of the Commission, or substitute the judgment of the court as to wisdom of the order. Such matters are beyond the province of this tribunal. In this case, the evidence taken before the Commission was not produced, and can not be considered, and this court, therefore, makes no attempt to review the record or establish independent conclusions as to its weight or sufficiency.

But the facts are here set up in the Commission's order and may be considered in the determination of the questions of law. The orders of the Commission are final unless (1) beyond the power which it can constitutionally exercise; (2) beyond its statutory right; or (3) based upon mistake of law. Interstate Commerce Commission vs. Union Pacific Railroad, 222 U. S. 541–547. Thus it may be set aside where the facts are established if "in violation of the constitutional prohibition against taking property without due process of law," or if the Commission acted "so arbitrarily and unjustly as to take action contrary to the facts found by it," or "if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the power." See Interstate Com-
31 merce Commission vs. Union Pacific Railroad, supra. "A conclusion which plainly involves, under the undisputed facts, an error of law" may be set aside. McLean Lumber Co. vs. United States, 237 F. 460.

Upon the facts found by the Commission, it is to be determined whether (1) a certificate should have been issued to Maher, (2) whether a cease and desist order should have been promulgated.

As to the issuance of the certificate, the Commission fell into three errors of law; first, because it refused issuance under the terms of the proviso of the section concluding that he had no "regular" route on June 1, 1935; second, in concluding that a change from an "anywhere-for-hire" to a fixed terminal operation destroyed Maher's right to a certificate notwithstanding all of his transportation was over the same route and within a definite territory; and third, by failing to consider the application under the terms of section 307.

As to the first point, the Commission confused its functions. It confused the diverse terms upon which the two different types of certificates are to be issued. There was an attempt in its conclusions to import the requirement of "regular routes" and "fixed termini" applicable only to certificates under Section 307 into the language of proviso 306 (a) and to make the failure of the applicant to have a "regular route" and "fixed termini" prior to June 1, 1935, a foundation for the absolute denial of the certificate and of the right to operate in interstate commerce at all.

The statute permits two different forms of applications for certificates relating to the transportation of persons or property for hire in interstate commerce. The first is by one who has been in bona fide operation in interstate commerce for a certificate to continue "over the route or routes within the territory for which application is made," under the proviso of Section 306 (a). The other is an application by any qualified person for a certificate of public necessity and convenience to perform a proposed service as common carrier by motor vehicle, under Section 307. Section 308 refers to this differentiation but establishes uniform provisions for both types of certificates. Under Section 306 (a) if the applicant cannot prove operation under the terms of the proviso, the application is to be treated as if it were tendered under Section 307. Confusion between these two diverse forms of application and also between the certificate confirming the rights accrued by an operation conducted in the past and the certificate of public necessity and convenience for future operations appears not only in the briefs but also the findings and conclusions of the Commission.

32

The second type of application is for a certificate by one not previously operating under the conditions prescribed by the act, and relates only to future operations. It is under the terms of the statute not to be issued to common carriers of passengers (1) "over other than a regular route or routes," (2) "and between fixed termini," (3) except for "special or charter operations" and is never to be issued (4) unless the service "is or will be required by the present or future public convenience and necessity." Section 307. The certificate confirming the rights gained by past operations and accepting previous

operation as a substitute for a finding of public necessity and convenience, on the other hand, is to be issued (1) upon a finding of bona fide operation before June 1, 1935, (2) continued since that time, (3) "over a route or routes or within the territory for which application is made." Section 306 (a). Congress did not in this section require a limitation to "regular" route or routes or between "fixed termini" nor make an exception as to charter or special operations. Neither was an actual "public convenience and necessity" requisite since Congress deemed the previous actual operation guaranteed the necessity
33 and convenience of the public.

By the proviso of Section 306 (a), Congress contemplated the continuance of any service by motor vehicle in interstate transportation, whether regular or irregular, seasonal or continuous, actually requisite or not. The purpose is plain. Congress was protecting the property and business of those previously engaged in bona fide transportation of persons and property by motor vehicle in interstate commerce. The proviso of Section 306 (a) set up a scheme for registration of special carriers without destroying their rights or their business. On the other hand, Section 307 provided definite limitations upon the operations of the persons who may in the future desire to obtain the privilege of conducting such operations.

The conclusion of the Commission makes clear the fallacy:

"We find that applicant has failed to establish that he was in bona fide operation as a common carrier by motor vehicle of passengers and their baggage between Portland, Oreg., and Seattle, Wash., over a regular route on June 1, 1935, and that he has so operated since that time."

This conclusion contains a negative pregnant because the facts found are that Maher was in bona fide operation as a common carrier by motor vehicle of passengers and their baggage over "a route," U. S. Highway 99, on June 1, 1935. Nowhere in the findings of fact is it suggested that Maher's operations were not bona fide. It is unquestioned that such operations before May 29, 1936, were not over a "regular" route between Portland, Oregon and Seattle, Washington. This prerequisite to confirmation of existing rights is that the person who made application "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time". 306 (a). Bona fide operation over a route or over a number of routes or within a territory is thus the primary essential. The intention to include all types of operation
34 is made clear by the fact that the applicant was not confined to a route or routes but was to be qualified if he operated within a territory. Further, it is indicated that a certificate was not only to be issued for a regular route but also for irregular routes for "common carrier" is defined in this particular as a person who transports persons and passengers "whether over regular or irregular routes." 303 (a) (14). This phrase was used not to make a dichotomy between these types of service, but to mark clearly the all

acing purpose of Congress. The law further goes to the extent cognizing seasonal service by motor vehicle in interstate com- e. 306 (a). The distinction that the Commission attempted to is made clearer by another finding as follows:

hen applicant instituted regular-route service between Portland Seattle it appears that he discontinued the so-called anywhere- ire operations theretofore conducted"

t both the "anywhere-for-hire" operations which were begun 31 and continued at least until the initiation of the service be- n Portland and Seattle in May 1936, and the operation with l termini" then begun and continuing to date, were "over a ," U. S. Highway 99, between these two points, and "within a tory," viz, that territory reached over U. S. Highway 99 and en Portland and Seattle. Maher made application for this and this territory according to the pleadings.

mmissioner Lee points out:

his applicant has been engaged in the interstate transportation assengers, as a carrier by motor vehicle, since 1931. Under the dfather' clause of the Motor Carrier Act, 1935, he is entitled to nue to operate. * * * By the 'grandfather' clause, it was nt to protect carriers in their existing operations."

the second place, the Commission concluded that because the icant had changed the type of his operation from an "any- where-for-hire" service, using U. S. Highway 99 in interstate commerce, to an operation with the "fixed termini" Portland and Seattle over the same highway, that the operation was continuous one.

is true the act also provides that the operation must have been nued. But the law does not denounce a change of one type rvice to another. Apt words could have been used if this were ntention. Undoubtedly, the applicant would be confined to the service which he was furnishing on June 1, 1935. However, e who had been operating a line in May and June of each year to June 1, 1935, had thereafter extended his service upon a around basis, it could not be argued that he abandoned the nal service. Similarly, if he had thereafter operated for eleven hs and in every month except May, he might have abandoned nonth of May and might even be confined to transportation in alone, but he could not entirely be denied a certificate. So r might well be confined to an "anywhere-for-hire" service upon Highway 99 and compelled to cease his "fixed termini" operation, e was still operating in interstate commerce over a route and in a territory and could not, therefore, be denied a certificate. establishment of a "fixed termini" operation could be deemed an donment of a claim for an "anywhere-for-hire" service in the territory since the act provides:

common carrier by motor vehicle transporting passengers under rtificate issued under this chapter may transport in interstate

or foreign commerce to any place, special or chartered parties under such rules and regulations as the Commission shall have prescribed." Sec. 208 (c).

Upon the facts, a distinction between a regular and an irregular route vanishes. The Commission found that all Maher's operations in interstate commerce were probably in part over U. S. Highway 99. This highway, then, is established for part of the distance, at least, as a regular route. It will be noticed that a regular schedule is
36 not mentioned in the definition. If it be held that Maher is no longer entitled to operate over other routes than U. S. Highway 99, he certainly never abandoned his right to serve the public upon that road. If, on June 1, 1935, he was performing an "anywhere-for-hire" service, it is inconceivable that he forfeited that right by placing his busses on schedule between "fixed termini" on that road so that those persons who wished to go to any point thereon for hire could do so without making special arrangements. In other words, if he be held to have abandoned his rights on other routes, his operation on U. S. Highway 99 after May 29, 1936, was an attempt to increase his service thereon rather than to abandon it. But the fact that the Commission by certificate might only authorize an "anywhere-for-hire" service in the territory contiguous to U. S. Highway 99 and falling short of Seattle, and compel him to cease operations over other highways altogether did not constitute a justification for its denial of his right to service at all.

The statute gives it sufficient power by the terms of the certificate which it should have issued to protect any type of operations, for it may "specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate" and could attach "to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require." Section 308. The Commission in many cases has heretofore exercised the power conferred upon it by granting the certificate applied for and imposing limitations. The cases of Hibbing, etc. Common Carrier Application,
37 1 M. C. C. 540; George Cassens, etc. Application, 1 M. C. C. 771; Slagle Contract Carrier Application, 2 M. C. C. 127 are illustrative of such action. In these cases the certificate was granted but delimited in terms in accordance with the previous business of the carrier.

The Commission further did not perform its full duty with regard to Maher. The law provides that if any applicant does not qualify as one who was "in bona fide operation as a common carrier by motor vehicle on June 1, 1935 * * * and has so operated since that time * * * then the Commission must go further and find

whether or not the applicant qualifies under Section 307. The particular language used is contained in Section 306 (a) and reads as follows: Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in Section 307 (a) of this chapter and such certificate shall be issued or denied accordingly." The Commission made no finding as to whether the "proposed service * * is or will be required by the present or future public convenience and necessity" as required by the latter section. 307 (a). That body apparently entirely disregarded this clause because no reference is made to it in the opinion or in the order. The briefs filed by the counsel for the Commission indicate clearly this attitude for they insist that it was the duty of Maher to file a new application under Section 307.

It is true that the Commission is given the power to fix by regulation the form of application for certificate but it would have no authority to abrogate the section of the statute under discussion by requiring two different applications. The intent of Congress was to permit no operation by an applicant after certificate had been denied, and it was, therefore, intended that all possibility should be exhausted in the one application. No assumption is necessary to arrive at this conclusion, since Congress require affirmative action by the Commission. The Commission thus acted contrary to the statute in denying a certificate where it failed to make jurisdictional findings of fact.

The Commission, therefore, took action not permitted to it by the law. All the facts required by Congress for the issuance of a certificate under the proviso of 306 (a) were found. The issuance was, therefore, mandatory. The Commission failed to issue a certificate because two erroneous conclusions of law were drawn, first, that an operation in interstate commerce "over a route" and "within a territory" was not entitled to protection when not over a regular route and between fixed termini, and second, that an irregular operation in interstate commerce was abandoned where a regular operation over the same route and within the same territory was carried on. The applicant was further denied rights by the Commission since that body failed to consider his application "in accordance with the procedure provided for in Section 307 (a)."

Based upon these erroneous interpretations, the Commission issued a "cease and desist order." This power was conferred upon that body by the statute under certain circumstances, Sec. 304 (6). But it was not the intention of Congress that when an applicant attempted to have his rights confirmed by a prayer for a certificate, the Commission should be empowered to issue an injunction. "As the Congress itself could not be, so it can not make its agents be, the final judge of its own power under the Constitution. Congress has no power * * * to prescribe what constitutes due process of law for its ascertainment." B. & O. Railroad Co. vs. United States, supra. Judicial

action is required before the Commission could enforce the provisions of the statute designed to prevent operation without a certificate, Sec. 205 (h); United States vs. Griffin, Receiver, No. 63, February 39 28, 1938, United States Supreme Court. This action in issuing a "cease and desist" order was unquestionably affirmative. Maher was commanded to cease an operation which the statute gave him the right to continue. Further, not only the "cease and desist" order but also the denial of certificate was affirmative.

The operation is not illegal under the statute while the application for a certificate is pending. Once certificate is denied by a valid order the operation becomes a crime. This is one of the distinguishing features between the case at bar and Lehigh Valley Railroad Company vs. United States, 243 U. S. 412, 414. There the risk arose from the statute itself. Here there is no risk of criminality until a certificate has been denied by valid order.

In Powell vs. United States, 300 U. S. 276, 285, the Commission struck out a tariff filed by the railroad whereby it included rates relating to a station which it was contended was not upon its line. The court says, in holding the order affirmative in effect " the order * * * confines the Seaboard's service within the junction switching limits, denies leave to that carrier to furnish, and prevents it from furnishing transportation to and from Fort Benning." In the instant case, by refusing to grant the certificate upon the facts found, the Commission would deny leave to plaintiff to furnish and would prevent it from furnishing transportation over U. S. Highway 99 in accordance with its previous service. This case is stronger than the Powell case for here the plaintiff was in actual operation legally before the statute took effect. A railroad has no legal right to operate an extension without a certificate based on a finding of public necessity and convenience. In the absence of the certificate, here the act of operation becomes a crime and is punishable. See Claiborne-Annapolis Ferry Co. vs. United States, 285 U. S. 382, 391–2.

40 The suspension of the order denying the certificate, then, would not leave the situation unchanged but would allow the plaintiff to continue in operation as he has done in the past. By annulment or suspension of the order, the plaintiff would have protection of those rights which Congress sought to confirm. Alton Railroad Co. vs. United States, 287 U. S. 229, 240. On the other hand, immediately upon the order becoming final, the plaintiff will be subjected to damage which is "substantial, immediate and irreparable." Alton Railroad Co. vs. United States, supra. The business of plaintiff, which although subject to regulation, was heretofore carried over the highways of Oregon and Washington with the consent of the states involved (Compare Buck vs. Kuykendall, 267 U. S. 307), is of substantial right and "the unnecessary and uncompensated taking or destruction of any property legally acquired and legally held" is unauthorized. Alton Railroad Co. vs. United States, supra; Reagan vs. Farmers' Loan & Trust Co., 154 U. S. 362; cited in B. & O.

Railroad Co. vs. United States, 298 U. S. 349. Even a temporary cessation of operation by plaintiff would cause loss of patronage and might destroy his business. The whole order in this case, therefore, is affirmative in its effect and displays the intention of the Commission to cut off the rights which the Congress itself granted to the plaintiff. Therefore, the court must go behind the assigned grounds and determine the validity of the order independently. Wallower vs. United States, 32 F. (2d) 524.

Inquiry as to what action the court should take under these circumstances must be made next. The order, to cease, and desist from all operation in interstate commerce, at least, must be set aside. Since the statute gives the court the power to annul an order in whole or in part, it makes no difference whether severable or not, it may
41 be annulled. It is said to create an anomolous situation, if the "cease and desist" order be set aside while the provisions of law prevent the plaintiff from operating after the refusal of the certificate. See Chesapeake and Ohio Railway Company vs. United States, 35 F. (2d) 769, 773. But such a situation cannot arise, since the paragraph denying the certificate is likewise affirmative in effect, and action should be taken in regard to it, also. It is said that this court, at least, has no power to compel the Commission to issue the certificate either by mandatory decree (Piedmont & Northern Railway Co. vs. United States, 280 U. S. 469) nor can the court, itself, issue the certificate, because the various limitations upon the terms of such a certificate are committed to the discretion of the Commission under Section 308. See The Chicago Junction Case, 264 U. S. 258, 264. The answer to this proposition is found in Alton Railroad Company vs. United States, supra, where it is said: "The court is not asked to prescribe reasonable divisions, or to direct that they be prescribed by the Commission. The court is asked to find that the Commission denied the Alton a constitutional right as a result of acting upon erroneous principles of law, and therefore to enjoin that part of the order."

The court has the power to suspend an order of the Commission. cnf. Atlanta, B. & C. R. Co. vs. United States, 37 F. (2d) 401; United States v. Atlanta, B. & C. R. Co., 282 U. S. 522, 527. If this paragraph, denying the certificate, were suspended, the application would still be pending, and the plaintiff would have the right to operate until the Commission granted or refused the application under the terms of the statute which provides "pending the determination of any such application, the continuance of such operation shall be lawful." Sec. 306 (a). The illegality of the operation which would be occasioned by the denial of the certificate would
42 not then exist until further action was taken. The Commission could thereupon either upon further hearing or upon the record now in its possession grant to plaintiff a certificate delimited under the terms of the statute or deny the certificate upon findings which would conform with the statutory requirements. Until such action

is taken, the terms of paragraph one of the order, denying certificate, are suspended. Paragraph two of the order, commanding Maher to cease and desist from further operations in interstate commerce is set aside.

Concurring opinion

CLAUDE MCCOLLOCH, District Judge, specially concurring:

I desire to express my special approval of that part of Judge Fee's opinion to the effect that whatever rights a carrier had as of June 1, 1935, should be respected and declared by the Interstate Commerce Commission, and certificate issued for the same. It would be a harsh rule to deny an applicant all rights simply because he claimed more or even a different right than he was entitled to. The extension of the jurisdiction of the Interstate Commerce Commission into the field of motor transportation is new and advanced legislation, and the Act should be construed to avoid injustice to the many small operators engaged in making their living in this field at the time the law went into effect.

43 *Dissenting opinion*

HANEY, *Circuit Judge, dissenting.*

I dissent.

First. Defendants challenge the jurisdiction of this court. Under the statute, our jurisdiction extends to "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." 28 U. S. C. A. 41 (28). The words "any order" as there used, mean "any affirmative order." Procter & Gamble v. United States, 225 U. S. 282, 293, 294; United States v. Griffin, — U. S. —, February 28, 1938. That part of the order which denies the application for a certificate of public convenience and necessity is, I believe, an order which is negative in substance and form, over which we have no jurisdiction. Piedmont & Nor. Ry. v. United States, 280 U. S. 469.

No contention is here made that we have jurisdiction under 205 (h) of the act. (See Coordinator Eastman's memorandum to the Senate Interstate Commerce Committee suggesting amendments to Senate Bill 1639, which is the act in question.)

Under the express words of the statute, however, our jurisdiction extends to part of an order. Petitioner contends that the cease and desist part of the order is affirmative.

I believe a cease and desist order is ordinarily subject to review by this court. Tap Line Cases, 234 U. S. 1.

Defendants contend, however, that the order is not separable because the action of the court would result in an anomalous situation, and rely on Chesapeake & Ohio Ry. Co. v. United States (D. C. W. Va.), 35 F. (2d) 769, affirmed 283 U. S. 35. That case does not hold that in such situation the order is not reviewable, and in fact is not in point,

because there the statute made "no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed con-
44 struction." 283 U. S. 35, 42. Here the Commission had no such latitude and discretion, for it was required to issue the certificate on proof of specified facts.

Since the order was a command to petitioner, I believe it is an affirmative order, and within our jurisdiction.

Second. The extent of our reviewing powers is stated in Interstate Commerce Commission v. Union Pacific R. R., 222 U. S. 541, 547. So far as is here material, the order in question is final, unless "based upon a mistake of law" under that case. There is no dispute as to the facts. Petitioner was on June 1, 1935, in operation on irregular routes within the territory for which application was made. The Commission construed the act to mean that petitioner was not entitled to a certificate covering a route between fixed termini, unless he was operating on a regular route on and since June 1, 1935, and defendants contend that such construction was correct.

I believe the Commission has not misconstrued the act. The "carrier" referred to in 306 (a) is defined in 303 (a) (14) to include those which operate "over regular or irregular routes." The fact that petitioner, on June 1, 1935, was operating over an irregular route, does not prevent issuance of a certificate, because of that statute. Under 306 (a) petitioner is entitled to a certificate "if (he) * * * was in bona fide operation * * * on June 1, 1935, over the route or within the territory for which application is made and has so operated since that time * * *" Petitioner although he was in bona fide operation on June 1, 1935, over an irregular route, has not "so operated since that time" because he commenced operations over a regular route on May 29, 1936, and has continued. In other words, I believe the statute means that if a carrier was operating over a regular route on June 1, 1935, he must have so continued after that date in order to obtain a certificate under 306 (a); and that if a carrier was operating over an irregular route on June 1, 1935.
45 he must have so continued after that date to obtain such a certificate.

Third. By 28 U. S. C. A. 306 (a), the Commission must issue a certificate upon proof of certain facts. If such facts are not proven, then "the application for such certificate shall be decided in accordance with the procedure provided for in section 307 (a) of this chapter and such certificate shall be issued or denied accordingly." Under the latter section proof of different facts is required before a certificate shall be issued. There is here no allegation in the bill that there was proof of such facts. There were no findings made by the Commission of the required facts. The evidence is not before us. Under such circumstances, we should presume that the Commission performed its duties and therefore refused to grant a certificate under 307 (a) because there was no showing of the required facts. I do not

believe we should declare that the Commission should have determined the application under 307 (a) when we do not know whether there was any evidence before it to consider.

Fourth. Did the Commission have power to make the cease and desist order? I think that it had such power. Under 306 (a) such a carrier may not operate without a certificate of public convenience and necessity. Violation of that section is made a crime. 322 (a). Express power to make the order is given by 304 (6) which provides: "It shall be the duty of the Commission— * * * (6) to administer, execute, and enforce all other provisions of this chapter, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration * * *"

For these reasons I think the bill should be dismissed.

46 [File endorsement omitted.]

47 In United States District Court

[Title omitted.]

Findings of fact and conclusions of law

Filed Sept. 7, 1938, as of July 9, 1938

Now at this time the above entitled matter comes on regularly for trial before the statutory court, convened pursuant to the Urgent Deficiency Act (Title 28, U. S. C. A. Sec. 41 (28) and Secs. 43–48), and, composed of the Honorable Bert E. Haney, Judge of the United States Circuit Court of Appeals for the Ninth District, and the Honorable James Alger Fee, and Claude McCulloch, Judges of the United States District Court of the United States for the District of Oregon. Plaintiff appearing in person, and by William L. Harrison and Edward O. Doxey, his attorneys; the United States of America appeared by and through Elmer B. Collins, Special Assistant to the Attorney General, Department of Justice, Washington, D. C., and Allan Hart, Assistant to the United States District Attorney, Portland, Oregon; and the Interstate Commerce Commission was represented by Nelson Thomas, its attorney, and it

Appearing to the Court that this case is regularly at issue on the bill of complaint, answer of the Interstate Commerce Commission, and the answer of the United States of America, and it

Appearing that the parties hereto have stipulated that the Court should consider the evidence in this matter as found by the Interstate Commerce Commission, which is as follows; to-wit:

"Applicant has been engaged in the transportation of passengers since 1931. Prior to the institution of his present regular operation between Portland and Seattle on May 29, 1936, he conducted an irregular, so-called anywhere-for-hire operation in Oregon with occasional trips to points in Washington. This operation consisted mostly of the transportation of groups of employees from Portland to logging camps

in Oregon and Washington. Baseball and basketball teams were also transported. Applicant maintained no terminal facilities. He obtained his business principally through contacts with employment agencies at Portland where men were hired for work at logging camps. While the application alleges that trips were made over the considered route on an average of three times per week, applicant testified that this was only an estimate and that "Sometimes I went into the State of Washington twice a day with two cars; and sometimes I didn't go into the State of Washington for a month." Operation was conducted in Oregon under an anywhere-for-hire permit issued by the Public Utilities Commission of Oregon. Two vehicles of 10 or 11 passenger capacity were used. Applicant did not publish a tariff but based his charges on the mileage involved on each trip.

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"Applicant kept detailed records with respect to his operations in Oregon for the purpose of making reports to the authorities of that State. No record, however, was kept of operations in Washington for the reason that no reports were made to the authorities of that State. In instances where trips were made to Washington applicant's records would show the destination point as Vancouver, Wash., or Vancouver Bridge, the point at which the State of Washington was entered. The oral testimony of applicant's witnesses is that trips were made at various times between 1933 and 1936 to Deep River, Cathlamet, Raymond, Aberdeen, Fall City, La Salle River, Chehalis, Olympia, Seattle, Centralia, Neah Bay, Greenwood, Port Ludlow, and Spokane, Wash. It appears that 11 such trips were made in 1935 and six during 1936 between January and April. The evidence does not disclose, however, what particular destinations were served on 16 trips just mentioned, but only that trips to points in Washington were made.

"Although the application alleges that regular-route operations were conducted on U. S. Highway 99 between Portland and Seattle and that all intermediate points were served on June 1, 1935, it is to be noted that many of the points specifically referred to in the evidence are located on other highways. For example, Cathlamet and Deep River are on U. S. Highway 830; Raymond and Aberdeen are on U. S. Highway 101; Neah Bay is in the extreme *m*orthwestern corner of the State a considerable distance from any point on U. S. Highway 99 between Portland and Seattle; and Spokane is in the extreme eastern part of the State many miles from U. S. Highway 99. Prior to the institution of his scheduled service between Portland and Seattle; applicant had not made a trip to Seattle since about 1933. There is no evidence of service at any time to most of the intermediate points on the considered route, nor is it shown that passengers were transported on return trips to Portland."

"At present applicant is engaged in the transportation of passengers between Portland and Seattle over U. S. Highway 99, serving intermediate points. Operations are conducted on a regular daily schedule between fixed termini. Fares are based on a published tariff.

A 25-passenger bus, purchased particularly for this service, is regularly used, and applicant also owns a 10-passenger vehicle which is used when needed. Operations as at present carried on were commenced on May 29, 1936, under the trade name Interstate Busses, a trade name not theretofore used."

and it

Appearing pursuant to said Findings, the Interstate Commerce Commission did, on the 27th day of October, 1937, enter the following order:

1. "It is ordered, that said application be, and it is hereby, denied effective December 10, 1937."

2. "And it is further ordered, that applicant be, and he is hereby notified and required to cease and desist, on or before December 10, 1937, from all operation in interstate or foreign commerce as a common carrier of passengers and their baggage by motor vehicle."

and from which order the applicant herein appealed; and

The court having heard the arguments of counsel, and having taken the matter under advisement, and directed counsel for respective parties to submit briefs, which said briefs have been submitted; and being now fully advised as to the premises herein, makes the following as its Findings of Fact, to-wit:

49 FINDINGS OF FACT

I

That the plaintiff (Dan E. Maher, applicant) has been engaged in the transportation of passengers for hire in interstate commerce between the states of Oregon and Washington since 1931.

II

That the transportation of passengers for hire in interstate commerce performed by the plaintiff prior to May 29, 1936, was not on a regular schedule.

III

That the plaintiff (Dan E. Maher, applicant) was in bona fide operation as a common carrier by motor vehicle of passengers and their baggage for hire in interstate commerce between the states of Oregon and Washington over U. S. Highway 99 on June 1, 1935, and that he has so operated since that time.

IV

That all service performed was in part over U. S. Highway 99 between the states of Oregon and Washington and more particularly between Portland, Oregon, and Deep River, Cathlamet, Raymond, Aberdeen, Fall City, LaSalle River, Chehalis, Olympia, Seattle, Cen-

tralia, Neah Bay, Greenwood, Port Ludlow, and Spokane, which points are all in the state of Washington.

V

That the court takes judicial notice that U. S. Highway 99 is in part the most convenient and feasible route between Portland, Oregon, and each and all of the points above mentioned.

VI

That all of the operation of the plaintiff as a common carrier of passengers for hire between Portland, Oregon, and the points above mentioned was over a route, to-wit, U. S. Highway 99, and within the territory, to-wit, the territory contiguous to U. S. Highway 99 for which application was made.

VII

That such transportation was being performed on June 1, 1935.

VIII

That plaintiff commenced a regular termini service on May 29, 1936, between Portland, Oregon, and Seattle, Washington, over U. S. Highway 99, and has so operated since that time

50

IX

That the court takes judicial notice that Deep River, Cathlamet, Raymond, Aberdeen, Fall City, LaSalle River, Chehalis, Olympia, Seattle, Centralia, Neah Bay, Greenwood, Port Ludlow, and Spokane, in the state of Washington, are within the territory for which plaintiff made application.

CONCLUSIONS OF LAW

I

The whole order of the Interstate Commerce Commission is affirmative, and, by virtue thereof, the Court has jurisdiction to entertain the suit.

II

Bona fide operation over a route, or over a number of routes, or within a territory, on June 1, 1935, requires the issuance of a certificate.

III

The issuance of a certificate should not be denied because plaintiff was not performing a fixed termini service on June 1, 1935.

IV

The establishment of a termini service by the plaintiff on May 29, 1936, was not an abandonment of the previous service over U. S. Highway #99.

V

The issuance of a certificate is mandatory.

VI

The Interstate Commerce Commission, under the Motor Carrier Act of 1935, when once any application is before it, is required to determine the matter of public convenience and necessity, and its failure to so determine upon the application before it, was erroneous.

VII

The law provides that if any applicant does not qualify as one who was "in bona fide operation as a common carrier by motor vehicle on June 1, 1935 * * * and has so operated since that time * * * then the Commission must go further and find whether or not the applicant qualifies under Section 307. The particular language used is contained in Section 306 (a) and read as follows: "Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in Section 307 (a) of this chapter and such certificate shall be issued or denied accordingly." The Commission made no finding as to whether the "proposed service * * * is or will be required by the present or future
51 public convenience and necessity" as required by the latter section. 307 (a). That body apparently entirely disregarded this clause because no reference is made to it in the opinion or in the order.

Done and dated at Portland, in the District of Oregon, this 7th day of September 1938 nunc pro tunc as of the 9th day of July 1938.

_____,
Judge of the United States Circuit Court of Appeals.

JAMES ALGER FEE,
Judge of the United States District Court for the District of Oregon.

CLAUDE MCCOLLOCH,
Judge of the United States District Court for the District of Oregon.

[File endorsement omitted.]

53 In United States District Court for the District of Oregon

No. E 9723

DAN E. MAHER, DOING BUSINESS AS INTERSTATE BUSSES, PLAINTIFF

vs.

THE UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Decree

Filed July 9, 1938

Now at this time the above entitled matter comes on regularly for trial before the statutory court convened pursuant to the Urgent Deficiency Act (Title 28, U. S. C. A. Sec. 41 (28) and Secs. 43–48) and composed of the Honorable Bert E. Haney, Judge of the United States Circuit Court of Appeals for the Ninth District, and the Honorable James Alger Fee, and Claude McColloch, Judges of the United States District Court of the United States for the District of Oregon. Plaintiff appearing in person and by William L. Harrison and Edward O. Doxey, his attorneys, the United States of America appeared by and through Elmer B. Collins, Special Assistant to the Attorney General, Department of Justice, Washington, D. C., and Allan Hart, Assistant to the United States District Attorney, Portland, Oregon; and the Interstate Commerce Commission was represented by Nelson Thomas, its attorney, and it

Appearing to the Court that this case is regularly at issue on the bill of complaint, answer of the Interstate Commerce Commission, and the answer of the United States of America; the facts were stipulated in open court to be as found by the Commission in the Findings of Fact entered by said Commission, and pursuant to which it entered, on October 27, 1937, the following order:

1. "It is ordered, that said application be, and it is hereby, denied effective December 10, 1937."

2. "And it is further ordered, that applicant be, and he is hereby notified and required to cease and desist, on or before December 10, 1937, from all operation in interstate or foreign commerce as a common carrier of passengers and their baggage by motor vehicle."

and from which order the applicant herein appealed; and

54 The Court having heard the arguments of counsel, and having taken the matter under advisement, and directed counsel for respective parties to submit briefs, which said briefs have been submitted; and being now fully advised as to the premises herein, it is

Ordered and adjudged that of the order of the Commission entered at a session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 27th day of October 1937,

the same bearing No. MC 59620, in the matter of Dan E. Maher, Common Carrier Application, namely, that part reading as follows:

"It is ordered, that said application be, and it is hereby, denied, effective December 10, 1937."

be, and the same is hereby suspended until such a time as the Commission either upon further hearing, or upon the record now in its possession, grants to the plaintiff a certificate delimited under the terms of the statute, or denies a certificate in conformity with the statutory requirements, and it is further

Ordered and adjudged that, namely, that part of the order reading as follows:

"And it is further ordered, that applicant be, and he is hereby notified and required to cease and desist, on or before December 10, 1937, from all operation in interstate or foreign commerce as a common carrier of passengers and their baggage by motor vehicle."

be, and the same is hereby annuled, cancelled, and set aside.

Done and dated at Portland, in the District of Oregon, this 9th day of July 1938.

_____,
Judge of the United States Circuit Court of Appeals.

JAMES ALGER FEE,
Judge of the United States District Court for the District of Oregon.

CLAUDE MCCOLLOCH,
Judge of the United States District Court for the District of Oregon.

Service accepted this 6th day of July 1938.

M. B. STRAYER,
Assistant United States District Attorney for the District of Oregon.

Exception to the entry of this order is allowed to each defendant.

JAMES ALGER FEE.
CLAUDE MCCOLLOCH.

[File endorsement omitted.]

56 In United States District Court

[Title omitted.]

Petition for appeal

Filed September 7, 1938

The United States of America and the Interstate Commerce Commission, defendants in the above entitled cause, feeling themselves aggrieved by the final decree entered therein by this Court on July 9, 1938, pray an appeal from said decree to the Supreme Court of the United States.

The particulars wherein they consider the decree erroneous are set forth in the assignment of errors accompanying this petition and to which reference is hereby made.

Said defendants pray that a transcript of record, proceedings and papers on which said decree was made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated September 6, 1938.

CARL C. DONAUGH,
United States Attorney.
THURMAN ARNOLD,
Assistant Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
DANIEL W. KNOWLTON,
NELSON THOMAS,
Counsel Interstate Commerce Commission.

Service accepted Sept. 6, 1938.

WILLIAM L. HARRISON.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Assignment of errors

Filed September 7, 1938

United States of America and Interstate Commerce Commission, fendants in the above-entitled cause, now come and file the follow- g assignment of errors in connection with their petition for an peal from the final decree entered by this Court on July 9, 1938, said cause:

The District Court erred:

1. In entering the decree suspending, annulling and setting aside e order of the Interstate Commerce Commission.

2. In holding that the Commission's order was affirmative and not egative," and that the Court had jurisdiction to review the order.

3. In holding that, upon the facts found and stated in the Commis- n's report, Section 206 of the Motor Carrier Act, 1935, made it ndatory upon the Commission to issue to the plaintiff a certificate public convenience and necessity.

4. In holding that plaintiff's operation of the "any-where-for-hire" vice on June 1, 1935, and thereafter until he abandoned it on May 1936, entitled him under the "grandfather" proviso of said Section to a certificate authorizing the continuance of the Portland-

Seattle operation, instituted May 29, 1936, over U. S. Highway 99, for which plaintiff's application was made to the Commission.

5. In holding that plaintiff's operation of the "any-where-for-hire" service on June 1, 1935, and thereafter until he discontinued it on May 29, 1936, entitled him under said "grandfather" proviso to a certificate authorizing either the re-establishment of all or a part
59 of the abandoned "any-where-for-hire" operation or the continuance of the new Portland-Seattle operation.

6. In holding that the Commission, upon the facts found by it, acted contrary to law in issuing its order denying plaintiff's application for a certificate and directing that he cease from all operations as an interstate motor carrier.

7. In holding that the Commission was without power to deny plaintiff's applicaton for a certificate on the ground that the service for which the application was made was not the service conducted by plaintiff on June 1, 1935.

8. In holding that the Commission was without power to deny plaintiff's application for a certificate on the ground that he had, on May 29, 1936, discontinued the service in which he was engaged on June 1, 1935.

9. In holding that plaintiff's abandonment of "any-where-for-hire" service on May 29, 1936, and his institution on that date of the daily scheduled Portland-Seattle service did not destroy his right under the "grandfather" clause to a certificate authorizing operation of any service over U. S. Highway 99.

10. In holding upon the facts found by the Commission that plaintiff "might well be confined to an any-where-for-hire service upon U. S. Highway 99 and compelled to cease his 'fixed termini' operation, but he was still operating in interstate commerce over a route and within a territory and could not, therefore, be denied a certificate."

11. In holding that: "The law provides that if any applicant does not qualify as one who was 'in bona fide operation as a common carrier by motor vehicle on June 1, 1935 * * * and has so operated since that time * * * ' then the Commission must go further and find whether or not the applicant qualifies under Section 307."

12. In holding, despite the fact that plaintiff's application was made and the right to the certificate claimed and supported solely under the "grandfather" clause of section 206, that the Commission acted contrary to law and failed to perform its full duty in merely denying the application as made and in failing to make findings of fact "as to whether the 'proposed service * * *' is or will be required by the present or future public convenience and necessity' as required by the latter section, 307 (a)."

13. In entering the decree suspending that part of the Commission's order which denies plaintiff's application for a certificate and annulling and setting aside that part of the order which directs plaintiffs to cease operating as an interstate motor carrier.
plaintiff to cease operating as an interstate motor carrier.

60 14. In failing and refusing to hold that the Commission's order is valid and lawful in all respects, and in refusing to enter a decree dismissing the bill of complaint.

CARL C. DONAUGH,
United States Attorney.
THURMAN ARNOLD,
Assistant Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
DANIEL W. KNOWLTON,
NELSON THOMAS,
Counsel, Interstate Commerce Commission.

Dated September 6th, 1938.

Service of a copy of the foregoing assignment of errors acknowledged this September 6th, 1938.

WILLIAM L. HARRISON,
Attorney for Plaintiff-Appellee.

[File endorsement omitted.]

62 In United States District Court

[Title omitted:]

Order allowing appeal

Filed September 7, 1938

In the above-entitled cause, the United States of America and the Interstate Commerce Commission, defendants, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final decree of this court in this cause entered July 1938, and having also made and filed an assignment of errors, and statement of jurisdiction, and having in all respects conformed to the statutes and rules of court in such case made and provided, it is Ordered and decreed that the appeal be, and it is hereby, allowed prayed.

This 7th day of September 1938.

JAMES ALGER FEE,
United States District Judge.

Service of a copy of the foregoing order allowing appeal is hereby knowledged this 6th day of Sept. 1938.

WILLIAM L. HARRISON,
Solicitor for Plaintiff.

File endorsement omitted.]

[Citation in usual form showing service on Wm. L. Harrison, filed Sept. 7, 1938, omitted in printing.]

68 In United States District Court

[Title omitted.]

Notice of appeal

Filed Sept. 9, 1938

To the ATTORNEY GENERAL OF THE STATE OF OREGON:

Pursuant to the Urgent Deficiencies Act of October 22, 1913, 38 Stat. L. 221, you are hereby notified that the defendants, United States of America and Interstate Commerce Commission have taken an appeal to the Supreme Court of the United States from the final decree entered by the District Court on July 9, 1938, in the above-entitled cause, and the citation makes the appeal returnable within sixty (60) days from the date thereof.

CARL C. DONAUGH,
United States Attorney.
THURMAN ARNOLD,
Assistant Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
DANIEL W. KNOWLTON,
NELSON THOMAS,
Counsel, Interstate Commerce Commission.

Service of a copy of the above notice acknowledged this 7th day of September 1938.

I. H. VAN WINKLE,
Attorney General of the State of Oregon.

[File endorsement omitted.]

70 In United States District Court

[Title omitted.]

Objections of defendants to findings of fact and conclusions of law entered by the court

Filed Sept. 20, 1938

Defendants, United States and Interstate Commerce Commission, object and except to the findings of fact and conclusions of law adopted and entered by the court in the above entitled cause.

1. The findings of fact are, as a whole, inadequate and insufficient, and constitute an incomplete, inaccurate, and erroneous statement of the facts in the case.

2. This court's opinion states the fact that "No evidence was introduced except a copy of the findings of the Commission which are accepted as the facts"; therefore, this court not only lacked an evidential basis for independent findings of its own, but also was bound by the

facts found by the Interstate Commerce Commission and set forth in its report.

3. The court's statement in the third paragraph of the introduction to its findings "that the parties hereto have stipulated that the court should consider the evidence in this matter as found by the Interstate Commerce Commission," is erroneous because no evidence was introduced before the court. The "stipulation" amounted to nothing more than plaintiff's declaration that he elected to proceed to trial upon the bill of complaint, including the Commission's report of its findings and conclusions of fact and its order, and the answers of the defendants, rather than to introduce before the court the record of testimony taken and considered by the Commission.

4. The quotations from the Commission's report, on pages 2 and 3 of the court's findings, are incomplete and present an erroneous statement of the facts because they omit and fail to include sev-
71 eral paragraphs of the Commission's report containing findings of fact which are essential to a proper consideration of the case.

5. The Court's findings of fact, as a whole, present an erroneous and misleading statement of the case in that, among other things, they fail to describe either the irregular "anywhere-for-hire" service in which plaintiff was engaged on June 1, 1935, and until May 29, 1936, or the regular scheduled Portland-Seattle service instituted on May 29, 1936, and fail completely to reflect or disclose the fact found by the Commission from the evidence that the service rendered by plaintiff on June 1, 1935, was a totally different service from the Portland-Seattle service established by plaintiff on May 29, 1936, for which his application for a certificate was made.

6. There was nothing before the court from which it could find the fact stated in its Finding I that plaintiff has been engaged in transportation of passengers between Oregon and Washington from 1931 to the date on which the court's findings were entered; the only facts before the court in that respect being those stated in the Commission's report rendered October 27, 1937. The bill of complaint, dated December 10, 1937, alleges that plaintiff was then a common carrier but this allegation was not admitted in defendants' answers, and plaintiff submitted no evidence to the court concerning his status or operations at the time of the trial.

7. There being no evidence before the court, there was no factual or evidential basis upon which it could find the facts stated in Findings II, III, and IV; and each of said Findings is erroneous and inaccurate in that it is different from, and contrary to, the facts found by the Commission.

8. Finding V is beyond the court's authority and is erroneous because, even if true, it assumes, without any factual support of evidence, that plaintiff used or traveled "the most convenient and feasible route" between Portland, Oregon, and the points mentioned in Finding IV. The only fact before the court concerning plaintiff's use of U. S. Highway 99 in his "anywhere-for-hire" service is the statement in the Commission's report that "while U. S. Highway 99 probably was used for

at least part of the distance on most, if not all, of applicant's trips to Washington, the evidence wholly fails to sustain applicant's claim that a regular common-carrier service over that route between Portland and Seattle, with service at all intermediate points, was conducted.

9. Findings VI and VII are erroneous and insufficient in that:

(a) they are contrary to and different from the facts found by the Commission concerning plaintiff's operation for his "any-
72 where-for-hire" service; (b) they are without factual basis insofar as they refer to plaintiff's application to the Commission and the service which plaintiff sought authority to perform because, as stated in the court's opinion, the application was not introduced before the court.

10. Finding VIII is erroneous and insufficient in that it fails to describe the Portland-Seattle service instituted by plaintiff on May 29, 1936, and fails to show the difference between that service and the "anywhere-for-hire" service performed by plaintiff on June 1, 1935; and, further, said finding is without factual basis for the statement that "plaintiff has so operated since that time" insofar as the statement applies to the period between October 27, 1937, when the Commission rendered its report, and the date on which said finding was made.

11. Finding IX is erroneous and without factual basis before the court in that plaintiff's application was not before the court, and, further, the application was not made for authority to operate "within a territory," but to operate between Portland and Seattle over U. S. Highway 99, as shown by the second paragraph of the Commission's report.

12. The court's Conclusion of Law I is erroneous in that the Commission's order is "negative" and the court was therefore without jurisdiction to review it.

13. Conclusion II is vague and erroneous insofar as its application to the facts of this case is concerned, in that, (a) it does not specify whether the certificate said to be required shall authorize the operation in which plaintiff was engaged on June 1, 1935, or the operation established on May 29, 1936, for which the Commission's report shows that the application was made; (b) it ignores the requirement of the Motor Carrier Act, 1935, that to obtain a certificate under the "grandfather" clause an applicant must show not only that he was engaged in bona fide operation of a motor carrier service on June 1, 1935, but also that he "has so operated since that time;" (c) the facts found by the Commission which bind the court in this case show that, although plaintiff was in bona fide operation as an "anywhere-for-hire" motor carrier on June 1, 1935, he abandoned the operation of that service on May 29, 1936, and established "a new and different service from that previously conducted."

14. Conclusion III is erroneous, misleading, and without application to the facts found by the Commission and upon which it denied plaintiff's application.

73 15. Conclusion IV is erroneous and is a finding of fact and not a conclusion of law; and it misstates and is contrary to the fact found by the Commission, that on May 29, 1936, plaintiff discontinued entirely the irregular "anywhere-for-hire" service conducted by him on June 1, 1935, and established an entirely new and different regular daily passenger service between Portland and Seattle exclusively over U. S. Highway 99.

16. Conclusion V is an incomplete and erroneous statement of the law in that, while the issuance of a certificate may be mandatory if an applicant establishes that he was in bona fide operation as an interstate motor carrier on June 1, 1935, and "has so operated since that time," it is not mandatory upon the facts found by the Commission in this case.

17. Conclusions VI and VII are erroneous statements of the requirements of the Motor Carrier Act, 1935, in that no language of the Act requires that the Commission consider or determine the question of public convenience and necessity in acting upon an application for a certificate made and supported solely under the "grandfather" clause, as it was in this case. Said conclusions construe the Act erroneously to require the Commission, before denying an application made and supported solely under the "grandfather" clause, (a) to make the futile finding or mere statement that public convenience had not been shown to require the operation, because no evidence thereof is submitted by the applicant, or (b) to assume the burden of making an independent investigation and development of facts concerning public convenience and necessity when such applicant does not rely upon that ground for a certificate, and thus to enlarge the grounds upon which such applicant claims a certificate, regardless of whether he consents to such enlargement.

18. The Conclusions of Law are, as a whole, erroneous and contrary to the provisions of the Motor Carrier Act, 1935, and proper and reasonable interpretation thereof.

CARL C. DONAUGH,
United States Attorney.
THURMAN ARNOLD,
Assistant Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
DANIEL W. KNOWLTON,
NELSON THOMAS,
Counsel, Interstate Commerce Commission.

Dated September 19, 1938.

Service of a copy of the foregoing objections acknowledged this September 19th, 1938.

WILLIAM L. HARRISON,
Attorney for Plaintiff.

[File endorsement omitted.]

74 And afterwards, to wit, on the 28th day of September 1938, there was duly filed in said Court, a Praecipe for Transcript of Record, in words and figures as follows, to wit:

75 In United States District Court

[Title omitted.]

Praecipe for transcript of record

Filed Sept. 28, 1938

To the CLERK:

You will please prepare a transcript of the record in the above entitled cause to be transmitted to the Clerk of the Supreme Court of the United States pursuant to the appeal heretofore taken, and include in said transcript the following:

1. Bill of complaint.
2. Answer of United States of America.
3. Answer of Interstate Commerce Commission and Exhibit A thereto.
4. Order convening the three-judge District Court.
5. Opinion of the Court, including concurring opinion of Judge McColloch and dissenting opinion of Circuit Judge Haney.
6. Findings of Fact and Conclusions of Law.
7. Exceptions of United States and Interstate Commerce Commission to Findings of Fact and Conclusions of Law.
8. Order or final decree.
9. Petition for appeal.
10. Assignment of errors.
11. Statement as to Jurisdiction.
12. Order allowing appeal.
13. Notice (pursuant to Rule 12 of the Supreme Court) of service on appellee of petition for appeal, order allowing appeal, assignment of errors and statement as to jurisdiction, and acknowledgment of service thereof.

76 14. Citation on appeal.

15. Notice to Attorney General of Oregon, and acknowledgement of service thereof.
16. Docket entries in proper order.
17. Praecipe for transcript of record.
18. Clerk's certificate.

CARL C. DONAUGH,
United States Attorney.
THURMAN ARNOLD,
Assistant Attorney General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
DANIEL W. KNOWLTON,
NELSON THOMAS,
Counsel, Interstate Commerce Commission.

Dated September 6th, 1938.

Service of copy of the above praecipe acknowledged this September 6th, 1938.

WILLIAM L. HARRISON,
Attorney for plaintiff-appellee.

[File endorsement omitted.]

77 In United States District Court

[Title omitted.]

Docket entries

December 15, 1937—Filed Bill of Complaint (no process).
" 28, " —Filed affidavit of mailing and service.
" 28, " —Filed motion of hearing before three judges.
January 8, 1938—Filed Answer of Interstate Commerce Commission.
" 18, " —Filed Answer of United States.
" 18, " —Entered order to set for February 11, 1938.
February 11 1938—Record of final hearing (Haney, Fee, McColloch).
" 11, " —Entered order allowing ptff. 10 days and deft. 10 days thereafter to submit briefs.
" 11, " —Filed brief of defendant, Int. Com. Com. in triplicate.
" 21, " —Filed brief of plaintiff in triplicate.
" 25, " —Filed letter from Atty. Thomas re extending date of its order to March 21, 1938.
March 3, 1938—Filed reply brief of Interstate Commerce Com. in triplicate.
June 16, " —Filed opinion.
July 9, " —Filed and entered final decree for plaintiff.
September 7, " —Filed and entered findings of fact and conclusions of law, nunc pro tunc as of July 9, 1938.
" 7, " —Filed petition for appeal.
" 7, " —Filed and entered order allowing appeal.
" 7, " —Filed assignment of errors.
" 7, " —Filed citation.
" 7, " —Filed Statement as to jurisdiction.
" 7, " —Filed notice of service of copies.
" 9, " —Filed notice of appeal.
" 20, " —Filed objections of defts. to findings of fact and conclusions of law.
" 28, " —Filed praecipe for transcript of record.

79 [Clerk's certificate to foregoing transcript omitted in printing.]

80 In Supreme Court of the United States

Statement of points and designation of record to be printed

Filed Oct. 20, 1938

I.

United States of America and Interstate Commerce Commission, appellants, state that in their brief and oral argument on their appeal in the above entitled cause they will rely upon all the points stated in their assignment of errors therein.

II.

The entire record in this cause as filed in this Court is necessary for consideration of the points stated by appellants, and the entire transcript of record as transmitted by the Clerk of the District Court should be printed by the Clerk of this Court.

N. A. TOWNSEND,
Acting Solicitor General.
DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.

SEPTEMBER 6TH, 1938.

Service of a copy of the above Statement of Points and Designation of Record to be Printed acknowledged September 6th, 1938.

WILLIAM L. HARRISON,
Attorney for Appellee.

[File endorsement omitted.]

[Endorsement on cover:] File No. 42,917. Oregon, D. C. U. S. Term No. 432. The United States of America and Interstate Commerce Commission, Appellants, vs. Dan E. Maher, Doing Business as Interstate Busses. Filed October 20, 1938. Term No. 432 O. T. 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1938